85-1324

NO. _____

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1985

WASHINGTON STATE NURSES
ASSOCIATION
Petitioner,

v.

WASHINGTON STATE HOSPITAL
COMMISSION; J.C. McCARTHY;
NORMAN RAMSEY; JON D. SMILEY;
ARCH LOGAN; and LINDA ZIMMERMAN,
Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard H. Robblee
Hafer, Price, Rinehart
& Schwerin
2505 Third Avenue, #309
Seattle, WA 98121
1-206-728-7280
Attorney for Petitioner

QUESTIONS PRESENTED

The district court concluded after a trial that a state hospital cost control agency's practices were pre-empted by federal labor law, based on its finding of fact that the agency had purposely controlled wage negotiations between hospitals and their employees' union. The court of appeals reversed. The questions are:

1. Did the court of appeals err in holding the district court's finding to be clearly erroneous?
2. Did the court of appeals err by terming the finding of fact as a conclusion of law?
3. Did the state agency conflict with collective bargaining rights granted by the National Labor Relations Act when it used its budget review practices and public pronouncements to minimize negotiated wage increases?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	1
Constitutional, Statutory, and Rules Provisions	1
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Court of Appeals' Disposition of the District Court's Finding of Fact Conflicts With Recent Decisions of This Court On Rule 52 and Requires Exercise of This Court's Power of Supervision	6
A. The Court of Appeals Rejected a Finding of Fact Which Was Based On a Plausible Analysis of Sophisticated Regulatory Practices, In Contravention of Rule 52 and *Anderson v. Bessemer City*, ____ U.S. ____, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)	6
B. The Court of Appeals' Unexplained Terming of the Finding of Fact As a Conclusion Conflicts With *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), As 'Ultimate Facts' Are Within the Scope of Rule 52	7
II. Washington State's Control of the Outcome of Collective Bargaining, In Order to Govern Prices Charged By Regulated Private Industry, Presents an Important Public Question of the Supremacy of the Federal Right to Bargain Collectively Over Conflicting State Economic Regulation	8

A. The Court Should Decide the Significant Public Issue of Whether a State's Interest In Controlling Hospital Costs Permits It to Purposely Control Or Influence Collective Bargaining 8

B. The Court Should Resolve the Conflict In Principle Between the Circuits On Whether a State, Even Lacking Power to Dictate Terms of Labor Agreements, May Coerce Settlements 11

Conclusion 12

TABLES OF AUTHORITY

Table of Cases

	Page
Amalgamated Association of Street Employees v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951)	9
Anderson v. Bessemer City, ____ U.S. ____, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)	6, 7
Commissioner v. Duberstein, 363 U.S. 278 (1960)	7
Division 1287, Amalgamated Association v. Missouri, 374 U.S. 74 (1963)	9
General Electric Company v. Callahan, 294 F.2d 60 (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832	11
Golden State Transit Corp. v. City of Los Angeles, 754 F.2d 830 (9th Cir. 1985), *cert. granted*, ____ U.S. ____, 87 L. Ed. 2d 611 (1985)	10
H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970)	8
Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982)	7
Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959)	8, 9, 10
Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976)	8, 9, 12
NLRB v. Insurance Agents, 361 U.S. 477 (1960)	8, 9
Oil, Chemical & Atomic Workers Local 5-283 v. Arkansas Louisiana Gas Company, 332 F.2d 64 (10th Cir. 1964)	11
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	7
Wisconsin Department of Industry v. Gould, Inc., 750 F.2d 608 (1984), *probable juris. noted*, ____ U.S. ____, 86 L. Ed. 2d 257 (1985)	10

Constitutional Provisions

U.S. Const. art. VI, cl. 2 1

Statutes

Conn. Gen. Stat. Ann. § 19a-145 *et seq.* (West) 9
Md. HG Code Ann. § 19-201 *et seq.* 9
Mass. Gen. Laws ch. 6A § 31 *et seq.* (Michie/Law. Co-op) 9
N.J. Stat. Ann. 26:2H-4.1 (West) 9
N.Y. Public Health Law § 2807 (McKinney) 9
N.Y. Public Health Law § 2807-a(McKinney) 9
N.Y. Public Health Law § 2807-a(5)(c) (McKinney) 9
RCW 70.39.010 2
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 3
28 U.S.C. § 1337 3
28 U.S.C. § 1343 3
29 U.S.C. § 157 1,8
W. Va. Code § 16-29B 9
Wis. Stat. Ann. § 54.01 *et seq.* (West) 9

Rules

Fed. R. Civ. Proc. 52 (1985) 6, 7
Fed. R. Civ. Proc. 52(a) (1985) 2

Other Authority

S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935) 8

OPINIONS BELOW

The opinion of the court of appeals is reported at 773 F.2d 1044. The findings and conclusions of the district court were not reported. The opinion, findings, and conclusions appear in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1985. No rehearing was requested. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS

Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Fed. R. Civ. Proc. 52(a) (1985):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Petitioner Washington State Nurses Association ("Association") bargains on behalf of several thousand registered nurses with hospitals whose budgets are regulated by Respondent Washington State Hospital Commission ("Commission"). The Commission's function in part is to assure that hospital "costs do not exceed those that are necessary for prudently and reasonably managed hospitals." RCW 70.39.010. The Commission conducts a detailed review of each hospital's proposed expenses and may order that a hospital delete certain expenses which it deems excessive. Commission review culminates in its determination that a hospital may collect a set amount of revenue by charging established rates.

Against a backdrop of hospital industry wage negotiations, the Commission in 1982 formally adopted a "guideline" for review of the salary and wage component of hospital budgets. Wage increases over 5% would not be approved in certain situations. Budgeted increases exceeding 5% would have to be "justified" to the Commission. The Commission adopted a similar guideline in 1983 for use in reviewing 1984 budgets. The Commission excepted negotiated increases in existing labor contracts from the guidelines but made no allowance for increases expected to be negotiated in upcoming collective bargaining.

Believing that the Commission was influencing and attempting to control the outcome of collective bargaining, the Association sued to enjoin Commission interference in the negotiation process. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1337, and 1343. The district court conducted a trial on a stipulated record of the Commission's budget review practices and public pronouncements.

There was evidence that individual Commissioners spoke out publicly on wage negotiations of the Association and other unions. One Commissioner, after noting that major nursing labor contracts were being negotiated, "caution/ed/ hospitals on settling at higher rates which will not necessarily be passed through the budget." Another Commissioner suggested to hospital industry representatives that hospital groups "should, in their negotiations, put emphasis on the position taken by the Commission."

There was evidence that the Commission formally ordered several hospitals to reduce their operating expenses by the amount by which their budgets for wage increases exceeded Commission wage guidelines. Although the Commission did not order hospitals to limit raises for specific employee groups, nurses' wages comprised a large proportion of total wage costs.

There was evidence that other hospitals had to justify proposed nurses' wage adjustments to the Commission after Commission staff had recommended cuts in the wage component of their oper-

ating expenses. In one instance, staff recommended that a $35,000 wage reduction be accomplished by recalculating the salary budget based on an adjustment of 5% for the nurses' labor contract for the remainder of the fiscal year. The Commission restored the wage amounts after the hospital protested that the staff's estimate of wages to be negotiated in the future was unrealistic. In another instance, a hospital and the Association negotiated a wage increase designed to bring nurses' compensation to competitive levels. Commission staff disapproved part of the catch-up amount. The Commission restored the full budgeted amount after hospital and union representatives justified the amount at a public hearing.

There was evidence that hospital negotiators would not discuss Association proposals for certain wage increases because the Commission would not approve wage increases exceeding the guidelines. The Commission guideline provided the ceiling for wage increases in several negotiations.

After considering a large record, the district court made a finding of fact that (Appendix D: 6):

> The Commission has taken the following action which has interfered with and/or influenced the outcome of collective bargaining:
>
> a. The Commission has indirectly, but purposely controlled the amount by which salaries for registered nurses represented by the Association should be increased.
>
> b. By statements at public hearings, the Commission used its position to influence hospitals to negotiate wage settlements with little or no wage increase. Commission members repeatedly told hospital officials that wage increases exceeding 5% would have to be "justified." Commission members on at least two occasions, without dissent or disclaimers, have cautioned hospitals against setting higher than desired wage increases with the Association and have urged hospital

> negotiators to emphasize the Commission's salary and wage policies in upcoming negotiations with the Association.

The court concluded (Appendix D: 7-8):

> The Commission is not acting in a "neutral" fashion as it seeks to adjust the interests of employers, unions, and employees in the collective bargaining arena. Congress has not elsewhere authorized states to influence and affect collective bargaining as the Commission has done here. For these reasons, the Commission's actions are pre-empted by Federal labor law.

Judgment was entered directing the Commission to cease and desist from any involvement in the collective bargaining process. The court also concluded that the Commission's practices similarly conflicted with state labor law governing public hospitals.

The court of appeals reversed. The court without explanation termed the district court's finding as a conclusion, but also held the finding to be clearly erroneous (Appendix A: 3-4). The court's disagreement was based on its understanding that the Commission had formal legal authority to set revenues, not to prevent increases in wages. The court acknowledged that the Commission meant "to encourage hospitals and unions to minimize cost increases" (Appendix A: 2-3), and that its conduct "may have an indirect influence on bargaining" (Appendix A: 14). But there was no conflict with federal labor law as the Commission could not "control" terms of specific labor agreements nor place "sanctions" on unions or hospitals which negotiated objectionable wage settlements.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Disposition Of The District Court's Finding Of Fact Conflicts With Recent Decisions Of This Court On Rule 52 And Requires Exercise Of This Court's Power Of Supervision.

A. The Court Of Appeals Rejected A Finding Of Fact Which Was Based On A Plausible Analysis Of Sophisticated Regulatory Practices, In Contravention Of Rule 52 And *Anderson v. Bessemer City*, ____ U.S. ____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

Agency regulation may be described in terms of the agency's legal mandate and formal statutory authority. Regulation as actually practiced may be quite different. The district court examined both the form and substance of the Commission's regulation and, after a trial, found as fact that the Commission had indirectly but purposely controlled collective bargaining. As reviewed in the Statement of the Case, there was evidence that the Commission used its budget procedures and its influence to coerce negotiators to settle labor contracts within state guidelines. The court of appeals, focussing instead on the Commission's authority to set rates and determine total revenues, found that the Commission did not control bargaining. The petition presents the question whether the court of appeals impermissibly substituted its analysis of the facts for the district court's plausible account.

Rule 52 is premised in part on the expertise of the trial judge: "(t)he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. Bessemer City*, ____ U.S. ____, 84 L. Ed. 2d 518, 529 (1985). In this case the district court had to resolve ambiguities necessarily present in evaluating sophisticated regulatory practices. Implicit in the district court's finding of fact was its belief that the Commission's method of regulation intruded beyond the outlines of its statutory charter. The rule is that an appellate court cannot

substitute its own view of the facts because it resolves ambiguities differently or gives facts another construction. *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 857-858 (1982). Particularly in light of *Anderson*, and the recent amendment to Rule 52, the finding is entitled to deference even though based on a stipulated record. *See also, Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960) (Rule 52 "applies also to factual inferences from undisputed basic facts").

While the public significance of the finding of fact may have increased the appellate temptation to substitute judgment, Rule 52 makes no exception for the type of case under appellate review. This Court in recent years has stepped up its supervision of appellate review of fact findings. *Anderson, supra; Inwood Laboratories, supra; Pullman-Standard v. Swint*, 456 U.S. 273 (1982). The court of appeals' rejection of the finding because of its focus on the form rather than substance of the Commission regulation makes Court supervision necessary again.

B. The Court of Appeals' Unexplained Terming Of The Finding Of Fact As A Conclusion Conflicts With *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), As 'Ultimate Facts' Are Within The Scope Of Rule 52.

The court of appeals, without discussion or citation, termed the district court's critical finding as a conclusion of law (Appendix A:3). The court of appeals' decision on that point was consistent with its view, treated above, that the facts should have been analyzed from the aspect of the Commission's formal authority. However, the gist of the district court's finding was that the Commision's method and practice of regulation, apart from the description of its formal authority, controlled collective bargaining. The district court found as fact what the regulators did. It is a separate matter as to what the law and regulations meant in the abstract. The former is a factual inquiry. The 'ultimate' fact that the Commis-

sion controlled bargaining is within the purview of Rule 52. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

II. Washington State's Control Of The Outcome Of Collective Bargaining, In Order To Govern Prices Charged By Regulated Private Industry, Presents An Important Public Question Of The Supremacy Of The Federal Right To Bargain Collectively Over Conflicting State Economic Regulation.

A. The Court Should Decide The Significant Public Issue Of Whether A State's Interest In Controlling Hospital Costs Permits It To Purposely Control Or Influence Collective Bargaining.

The National Labor Relations Act grants employees the right to bargain collectively with employers. 29 U.S.C. §157. The Act was designed to regulate the procedure of collective bargaining but leave the parties free to determine its substance. S. Rep. No. 573, 74th Cong. 1st Sess., 12 (1935); *compare, H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 107-108 (1970) (describing "private bargaining under governmental supervision of the procedure alone" as "the fundamental premise on which the Act is based"). This doctrine underlies three labor pre-emption cases of this Court. In *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 295-297 (1959), this Court held that a state could not apply its antitrust law to invalidate a term of a labor contract. Nor may the state or federal governments regulate labor's economic weapons left open to them under federal law, as such regulation would impermissibly influence the substantive terms of labor contracts. *NLRB v. Insurance Agents*, 361 U.S. 477, 490 (1960) (NLRB); *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 149, 153 (1976) (state labor agency).

The Court has never decided whether labor pre-emption principles similarly prohibit the efforts of states to influence or control

the outcome of bargaining in the name of price control. This Court has struck down state efforts to outlaw or control strikes against public utilities, holding that public utilities have no unique status under the Act separate from other employers. *Amalgamated Association of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951); *Division 1287, Amalgamated Association v. Missouri*, 374 U.S. 74 (1963). *Oliver* decided that a state could not prevent implementation of a contract term concerning a mandatory subject of bargaining. The rationale of *Oliver* was understood by this Court in *Machinists v. WERC*, 427 U.S. 132, 153 (1976) to also prevent "state attempts to *influence* the substantive terms of collective-bargaining agreements" (emphasis added). No decision has addressed whether the principles animating *Oliver, Machinists*, and *Insurance Agents* foreclose states from regulating industry costs by coercing labor and management to reach 'reasonable' settlements.

The national health care cost containment problem has brought this conflict between state regulation and federally protected rights to the forefront. At least seven states in addition to Washington have adopted hospital rate-setting legislation with varying degrees of regulation over hospital budgets.[1] One state even allows a state officer to determine whether additional negotiated labor costs are reasonable and should be added to the rate base. McKinney's Consolidated Laws of New York, Public Health Law §2807-a(5)(c). Whether the Washington Commission controlled labor negotiations or, in the words of the court of appeals, merely "encourage/d/ hospitals and unions to minimize cost increases" (Appendix, A: 3), the state uses its powers to influence negotiators to the state's view of a reasonable settlement.

---

[1] Connecticut: C.G.S.A. §19a-145 *et seq.*; Maryland: Anno. Code Md. HG §19-201 *et seq.*; Massachusetts: GL c. 6A §§31 *et seq.*; New Jersey: N.J.S.A. 26: 2H-4.1; New York: McKinney's Consol. Laws N.Y. Public Health Law §§ 2807, 2807-a; West Virginia: West. Va. Code §16-29B; Wisconsin: W.S.A. §54.01 *et seq.*.

The Commission's actions, and the decision below, are critical to the future scope of collective bargaining with regulated industires. When the State coerces the parties to agree to the outcome it desires on employee wages – the most contentious mandatory subject of bargaining – free collective bargaining is circumscribed. State action also discourages such inventive bargaining solutions as trading higher pay for other contract concessions, or negotiating comparable worth adjustments without governmental compulsion.

The Court stated its rationale in *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 296 (1959), as follows:

> We believe that there is no room in this /federal statutory/ scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. (citations omitted)

The court should decide whether the same pre-emption principle prohibits the Commission from limiting the substance of the Association's collective bargaining.

This Court reviews two cases this Term where states enforced their concept of proper labor conduct against employers through state franchise and purchasing powers. *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985), *cert. granted* ____ U.S. ____, 87 L. Ed. 2d 611 (June 17, 1985) (No. 84-1644); *Wisconsin Department of Industry v. Gould, Inc.*, 750 F.2d 608 (7th Cir. 1984), *probable juris. noted* ____ U.S. ____, 86 L. Ed. 2d 257 (May 20, 1985) (No. 84-1484). Resolution of either case may illuminate the issues at stake here. Petitioner Association, before any opinion was issued, requested the court of appeals to stay further proceedings pending decision of *Golden*

State and *Gould* (Appendix B). The court of appeals declined (Appendix C). While Petitioner believes this case worthy of full consideration, the Court could grant the writ and issue an appropriate order after the two cases are decided.

B. The Court Should Resolve The Conflict In Principle Between The Circuits On Whether A State, Even Lacking Power To Dictate Terms Of Labor Agreements, May Coerce Settlements.

The courts below disagree on whether the Commission controlled bargaining. Even under the court of appeals' conception, the Commission's budget review practices and public pronouncements "undoubtedly /were/ intended to encourage hospitals and unions to minimize cost increases" (Appendix A: 3). Nevertheless, the court of appeals found no interference "in any impermissible way" with the exercise of collective bargaining rights. *ibid.* Hence, the state in the view of the court of appeals could use its machinery and its position as controller of the hospital purse strings to influence labor negotiators.

Two other courts of appeals have held that state mediation agencies were pre-empted by the National Labor Relations Act from investigating and publicly issuing non-binding recommendations concerning labor disputes. *General Electric Company v. Callahan*, 294 F.2d 60 (1st Cir. 1961), *cert. dismissed* 369 U.S. 832; *Oil, Chemical & Atomic Workers Local 5-283 v. Arkansas Louisiana Gas Company*, 332 F.2d 64 (10th Cir. 1964). Both decisions were premised on the principle that the Act was meant to encourage collective bargaining, not to coerce agreement. *Callahan*, 294 F.2d at 67; *OCAW*, 332 F.2d at 66. The court of appeals below acknowledged the Commission's intent to encourage low wage settlements but reached the opposite conclusion from the First and Tenth Circuits. The distinction between a state mediation agency and a hospital cost control agency is immaterial, as both agencies sought to "accommodate ... the special interests of

employers, unions, or the public in areas such as ... collective bargaining." *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 156n. (1976) (Powell, J., concurring). There is a square conflict between the circuits which should be resolved.

CONCLUSION

The Court should grant certiorari to review the decision of the court of appeals.

Respectfully submitted,

Richard H. Robblee
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT

WASHINGTON STATE NURSES
ASSOCIATION,

Plaintiff-Appellee,

v.

WASHINGTON STATE HOSPITAL
COMMISSION, ET AL.,

Defendants-Appellants.

No. 84-4113/4131
D.C. # CV-83-533-T

OPINION

Appeal from the United States District
Court for the Western District of
Washington
Honorable Jack E. Tanner, District
Judge, Presiding
Argued and submitted May 9, 1985,
In Seattle, Washington

SCHROEDER, Circuit Judge

This litigation illustrates the continuing tension between the interest of labor in improving wages and the interest of state governments in containing rising hospital rates. The State of Washington

has granted the Washington State Hospital Commission the power to determine the maximum rates which each hospital in the state can charge patients. The Washington State Nurses Association, a labor organization representing nurses, filed this action against the Commission for an injunction against certain Commission practices which the Association claimed interfered with its state and federally protected rights to bargain for wage increases.

The district court granted an injunction against the Commission's "involvement" in collective bargaining. The injunction was based on a stipulated record reflecting certain budget review practices of the Commission and certain public pronouncements of its members. We reverse. We conclude that the budget review practices and public pronouncements, while undoubtedly intended to

encourage hospitals and unions to minimize cost increases, could not control the terms of any particular collective bargaining agreement, and did not interfere in any impermissible way with the exercise of collective bargaining rights protected by section 7 of the National Labor Relations Act, 29 U.S.C. § 157. No conflict occurs with federal law which would justify a holding that the state's activities are preempted by federal law within the standards we apply. See Brown v. Hotel and Restaurant Employees, ____ U.S. ____, 104 S. Ct. 3179, 82 L.Ed. 2d 373 (1984); Hill v. Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945); Golden State Transit v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984).

The district court concluded that

"[t]he Commission has indirectly, but purposely controlled the amount by which salaries for registered nurses represented by the Association could be increased." Although the court's findings did not identify specific practices to which it was referring, the underlying facts are not materially in dispute.[1/] The record reflects that the principal objectionable practice is the Commission's use of "guidelines" to measure the reasonableness of wage increases as a component of the overall costs which the Commission permits to be reflected in rates. Pursuant to the authority given the Commission to review a hospital's financial status, the Commission requires hospitals to submit their proposed budgets for review. The Commission then breaks down the information submitted into various categories; one such category is total salary and wages. Under the guidelines, a comparison is made

where the overall wage increases amount to more than five percent over the preceding year. In that event, the hospital's overall costs are compared to increases of hospitals of comparable size in the same geographic area, and if the increase in question exceeds that rate, the Commission requires a justification for the increase. It appears that on several occasions the Commission did not find the justification satisfactory and refused to recognize projected wage increases as part of the hospital's total projected costs to be offset by increased rate revenue.

In assessing the degree to which these practices actually affect collective bargaining negotiations, we believe it is significant that the guidelines measure total salaries and wages as one cost category, without regard to collective bargaining units or even classifications of employees. Neither nurses nor unions

receive any special consideration. It is equally significant that even when a wage increase is "disapproved," the Commission cannot prevent the hospital from increasing wages. The Commission's only control is over the revenue which the hospital can receive from rates. So far as the Commission is concerned, the hospitals are free to contract to pay wages at any level so long as they are able to meet their obligations, either by obtaining revenue from sources other than rates, or by reducing costs in other areas.

The Commission's budget guideline practices with respect to wages are mirrored in the public statements made by Commission members, which the district court also found objectionable. For example, the Commission's Chairman stated: "During the current period of economic recession and high unemployment the Commission must promote budget con-

straints, cost awareness, prudent buying practices, conservationism [sic] in granting salary and wage adjustment and postponement or scaling down of capital expenditures."

The court's findings in relevant part were that:

> By statements at public hearings, the Commission used its position to influence hospitals to negotiate wage settlements with little or no wage increase. Commission members repeatedly told hospital officials that wage increases exceeding 5% would have to be "justified." Commission members on at least two occasions, without dissent or disclaimers, have cautioned hospitals against setting higher than desired wage increases with the Association and have urged hospital negotiators to emphasize the Commission's salary and wage policies in upcoming negotiations with the Association.

In assessing the affect [sic] of these oral statements on bargaining, as in evaluating the Commission's practices with respect to the guidelines, it is significant that the Commission's legal authority

is limited to setting rates. It can neither actually limit overall costs nor impose wage ceilings. Given the fact that wages comprise sixty percent of hospitals' costs, any statements by public officials charged with responsibility for trying to reduce costs inevitably would have to encompass wages. It does not appear, however, that the Commission regularly singled out particular collective bargaining negotiations for comment. The statements that were made cannot be viewed as any more controlling over the bargaining process than the guideline practices.

The issue we must decide is whether the Commission's practices and statements on wage increases acted as a restraint on the exercise of collective bargaining rights protected by federal law. The two leading circuit court decisions dealing with state efforts to deal with rising costs and rates in certain industries are

Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984), and Amalgamated Transit Union, Division 819 v. Byrne, 568 F.2d 1025 (3d Cir. 1977) (en banc). In Dukakis, the First Circuit held that a state statute aimed at restraining increases in hospital costs did not impermissibly interfere with collective bargaining rights of the nurses union. The court concluded, in a careful opinion, that federal labor policy does not preempt a state statute which regulates hospital costs by imposing an overall limit on what hospitals can collect for patient care.

The aim of the Washington statute is similar to that of the Massachusetts law considered in Dukakis. It authorizes the Commission to set the "types and classes of charges" for hospitals and to review hospitals' financial records in order to establish the maximum rates each hospital can charge patients. See Wash. Rev. Code

§§ 70.39.150, 70.39.160. We agree with the First Circuit in Dukakis, that a statute authorizing the control of rates which "is oriented toward neither labor-management issues in general nor wages in particular," 726 F.2d at 44, does not impermissibly interfere with collective bargaining.

The plaintiff in this case does not claim that the state statute itself conflicts with federal labor policy. It argues that the budget review practices and public statements of the Commission constitute such an interference with bargaining that they conflict with federal labor law. The most instructive and influential opinions on related, but, as we shall see, more difficult issues, are those of the Third Circuit, sitting en banc, in Byrne. There, the governor of New Jersey threatened to take away state subsidies of private transportation

companies in the event that the employers and the unions agreed to a proposed uncapped cost of living adjustment clause in pending negotiations. 568 F.2d at 1026-27. A majority of the Third Circuit held that even such a direct threat did not impermissibly interfere with the collective bargaining process. The minority, in strong dissents, would have held that the threat was an impermissible interference in the negotiations. Judge Aldisert's dissent made a distinction, which the court in Dukakis quoted with at least some approval, and which describes a key distinction between this case and Byrne. That is the distinction between a threat of withdrawing a subsidy and a communication to all negotiating parties of the overall level of financing which the state will permit:

> [T]here exists a critical difference between a state communicating to all affected parties the extent of

> finances it intends to grant for carriers' operations and a state communicating that it will not continue its subsidization if the carriers agree with the unions to retain uncapped cost of living clauses in their employment contracts. The former communication presumably does not constitute interference with negotiations over wages and working conditions, as it is not a state attempt "to influence the substantive terms of collective bargaining agreements."

Byrne, 568 F.2d at 1035 (Aldisert, J., dissenting); quoted in Dukakis, 726 F.2d at 44.

We conclude that the practices and statements upon which the district court's injunction was based fall short of the kind of control over collective bargaining which might impermissibly interfere with the exercise of rights under section 7. Under the standards that have developed in this area, it is clear that state efforts to cap cost increases by limiting the hospitals' revenue is a proper province of state regulation. Dukakis, 726 F.2d 41;

Byrne, 568 F.2d 1025. The Washington State Hospital Commission's wage guidelines give the hospitals no less flexibility in managing their overall costs than they would have if the Commission simply imposed a percentage cap on rate increases. Indeed, given the possibility for overriding the guidelines by justifying increases which exceed them, the hospitals may have even greater flexibility under the present system than they would have in the event of a revenue cap.

The efforts of the Commission, both in its use of guidelines and in its urgings to reduce hospital costs, do not impose sanctions on either the union or the employer with respect to collective bargaining negotiations. Cf. Brown, ____ U.S. ____, 104 S. Ct. at 3192, 82 L.Ed.2d at 392 (White, J., dissenting); Hill v. Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L.Ed. 1782 (1945). This case is far

removed from Local 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 79 S. Ct. 297, 3 L.Ed.2d 312 (1959), where a state enacted an antitrust law that struck down a provision governing pay for truck owners who drove their own rigs. The Court held that such invalidation of a specific term had an impermissible impact upon the actual terms of bargaining, an area expressly left unregulated by Congress. Id. at 296, 79 S. Ct. at 305, 3 L.Ed.2d at 322. Here, the Commission has not invalidated an actual negotiated scale, but has simply set guidelines for total wage costs. Wage increases greater than the guidelines are not unlawful.

The conduct of the Commission may have an indirect influence on bargaining. We observed in Golden State Transit Corp. v. City of Los Angeles, 754 F.2d 830, cert. granted, 105 S. Ct. 3475 (1985),

that "[i]n any regulated industry, a myriad of governmental decisions from rate-setting to establishment of safety standards are bound to affect labor relations in that industry." Id. at 833. The government actions in this case had far less actual effect on any particular negotiations than the government decision in that case to withhold a franchise to do business until a specific labor dispute was resolved. The record before us shows that the Commission's policies and statements were aimed principally at encouraging the reduction of overall wages a well as other costs. We hold that they did not prevent or significantly inhibit the exercise of collective bargaining rights protected by the NLRA.

For similar reasons, we must reject the argument that there was a conflict between the Commission's conduct and State laws guaranteeing collective bargaining

rights similar to those guaranteed by federal law. See Allen v. Seattle Police Officers Guild, 100 Wash. 2d 361, 670 P.2d 246, 252 (1983).

The judgment of the district court is REVERSED.

FOOTNOTE

1/ To the extent that the district court's characterization of the Commission's conduct as purposeful control over collective bargaining negotiations may be deemed a finding of fact, it is not supported by the stipulated record and is clearly erroneous. See Anderson v. City of Bessemer City, 105 S. Ct. 1504 (1985).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE NURSES
ASSOCIATION,

Plaintiff/Appellee/
Cross-Appellant,

v.

WASHINGTON STATE HOSPITAL
COMMISSION, et al.,

Defendants/Appellants/
Cross-Appellees.

NOS. 84-4113
84-4131

DC NO. CV-83-533-JET

MOTION TO STAY PROCEEDINGS

Appellee Washington State Nurses Association moves the Court to stay further proceedings and issuance of decision in this case pending decision by the Supreme Court of the United States in two cases in which certiorari recently was granted, or probable jurisdiction noted, Golden State Transit Corp. v. City of Los Angeles, 754 F.2d 830 (9th Cir. 1985)

cert. granted ____ U.S. ____, 87 L Ed 2d 611 (June 17, 1985); Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984), probable jurisdiction noted ____ U.S. ____, 86 L Ed 2d 257 (May 20, 1985). The decision in Golden State was reported in the August 23, 1985 advance edition.

The first Golden State appeal was argued in the parties' briefs, and the second Golden State appeal was cited to this panel by the Association after briefing had been concluded. While the Association believes that the case is factually distinguishable, it is likely that the Supreme Court decision will shed light on the applicability of the labor pre-emption doctrine to state intervention in the collective bargaining process. That is the same issue which is central to the instant case. The Gould case concerns

a state law which disbars "labor law violators" from obtaining state contracts. Again, it is likely that the Supreme Court will address the pre-emption issue and clarify the law in the area. The Golden State case is particularly significant as it involves the so-called "second line of pre-emption analysis" at stake in the instant case. That analysis focuses "upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because 'left to be controlled by the free play of economic forces.'" Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140 (1978). There have been only a handful of Supreme Court cases to address this issue in the last thirty years. Golden State undoubtedly will add to the law and assist the Court in resolving this case.

It would serve the interests of judicial economy to stay this appeal

pending decision in Golden State and Gould. If this Court issues its decision before the Golden State and Gould decisions are handed down, it is likely that this Court will reconsider in light of the new opinions. If the proceedings are stayed, the parties will have the opportunity to brief the issues in the light of the new opinions and the Court will be fully advised before deciding the case.

DATED this 2nd day of October, 1985.

Richard H. Robblee
Hafer, Price, Rinehart
& Schwerin
Attorneys for Appellee
Washington State
Nurses Association

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE NURSES
ASSOCIATION,

Plaintiff-Appellee/
Cross-Appellant,

vs.

WASHINGTON STATE HOSPITAL
COMMISSION, et al.,

Defendants-Appellants/
Cross-Appellees.

Nos. 84-4113
84-4131

ORDER

Before: GOODWIN, SCHROEDER, and
BEEZER, Circuit Judges

The motion to stay proceedings in these appeals is denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

WASHINGTON STATE NURSES ASSOCIATION,

Plaintiff,

-vs-

WASHINGTON STATE HOSPITAL COMMISSION, et al.,

Defendant.

NO. C83-533T

FINDINGS OF FACT AND CONCLUSIONS OF LAW

---

1. Plaintiff, Washington State Nurses Association ("Association") is an unincorporated professional organization with its principal office in Seattle, Washington.

2. Defendant, Washington State Hospital Commission ("Commission"), is an agency of the State of Washington with duties and powers as set forth in Wash.Rev.Code 70.39. Four of the five

individuals, J.C. McCarthy, Norman Ramsey, Jon D. Smiley, and Arch Logan, Jr., M.D., are members of the Commission. The fifth named Defendant, Beverly Freeman, was a member of the Commission, but resigned in 1983. Linda Zimmerman, who was appointed by the governor to fill the vacancy created by Ms. Freeman's resignation, was added as a party defendant, and Beverly Freeman was stricken as a party defendant.

3. The Association is the exclusive collective bargaining representative, within the meaning of Title 29 U.S.C. § 159, and Wash.Rev.Code 41.56.080, for several thousand registered nurses employed by hospitals regulated by the Commission. The Nurses Association negotiates with such hospitals for collective bargaining agreements which govern the wages, employment benefits, and other conditions of employment of registered nurses.

4. Pursuant to Chapter 70.39 Wash.Rev.Code, the Commission is charged with the duty to approve rates for all hospitals in the State of Washington. Hospitals may charge only those rates approved by the Commission.

On an annual basis, each hospital is required to submit to the Commission its budget and rate request for the following year. The Commission staff reviews the various components of the request to ensure that total hospital costs are reasonably related to total services, that hospital rates are reasonably related to aggregate costs, and that rates are set equitably among all purchasers of services without undue discrimination.

Review of a budget rate request necessarily involves examination of the several components of a proposed budget, including capital accounts and operating expenses. Operating expenses are a

significant component of any budget and all wages, salaries, and employee benefits, including those of nurses, comprise 55-60% of operating expenses. Commission staff, therefore, monitors all the various components of operating expenses, including wages and salaries. The Commission does not segregate wages and salaries which are the result of collective bargaining and those which are individually negotiated.

5. Before 1982, the Commission had informal guidelines, for use by itself and its staff, for the evaluation of increases in hospital budgets. In November of 1982, the Commission adopted a guideline directed solely toward salary and wage increases for use in review of fiscal year 1983 budgets. The guideline adopted in 1982 provided that salary and wage increases in excess of 5% would not be approved in certain situations. In such

cases, staff was directed to allow budgeted salaries and wages contained in labor agreements until they expired, and then for the balance of the fiscal year allow a 5% increase or [sic] base salaries and wages plus incidental increases due to longevity and shift differentials.

6. The Commission adopted a guideline for 1984 fiscal year budgets in November of 1983. Unlike the earlier guideline, this guideline applied to other expenses in addition to salaries and wages. The content of the 1984 fiscal year guideline was the same as the 1983 fiscal year guideline for salaries and wages, except that the 1984 guideline was triggered by a lower budgeted percentage increase (5% and 6.3%) than the 1983 guideline (5% and 7%).

7. Salaries for all hospital employees comprise 55% and 60% of all

operating expenses for the typical hospital. Of total salaries, 50% is attributable to nurses. Typically, more than half of a hospital's nurses are registered nurses.

8. The Commission has taken the following action which has interfered with and/or influenced the outcome of collective bargaining:

a. The Commission has indirectly, but purposely controlled the amount by which salaries for registered nurses represented by the Association should be increased.

b. By statements at public hearings, the Commission used its position to influence hospitals to negotiate wage settlements with little or no wage increase. Commission members repeatedly told hospital officials that wage increases exceeding 5% would have to be "justified." Commission members on at least two occasions, without dissent or disclaimers, have cautioned hospitals against setting higher than desired wage increases with the Association and have urged hospital negotiators to emphasize the Commission's salary and

wage policies in upcoming negotiations with the Association.

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Insofar as any Finding of Fact herein is more appropriately denominated a Conclusion of Law, it is hereby adopted as such.

2. This Court has personal jurisdiction over the parties. Subject matter jurisdiction is conferred by Title 28 U.S.C. §§ 1331, 1337 and 1343, and by the doctrine of pendent jurisdiction.

3. The practices of the Commission, as set forth in the Findings of Fact, and as they pertain to non-public hospitals whose labor relations are governed by the National Labor Relations Act, Title 29 U.S.C. § 141, et seq., conflict with that Act and are illegal. Employees have the

right to bargain collectively. Title 29 U.S.C. § 157. The Commission is not acting in a "neutral" fashion as it seeks to adjust the interests of employers, unions, and employees in the collective bargaining arena. Congress has not elsewhere authorized states to influence and affect collective bargaining as the Commission has done here. For these reasons, the Commission's actions are pre-empted by Federal labor law.

4. The practices of the Commission, as set forth in the Findings of Fact, and as they pertain to public hospitals whose labor relations are governed by Wash.Rev.Code 41.56, are in conflict with that Code and are illegal. Wash.Rev.Code 41.56 was patterned after the National Labor Relations Act and similarly grants public employers and unions the right and duty to bargain, with no limit on the outcome of such bargaining. The legisla-

ture, in enacting Wash.Rev.Code 70.39, did not authorize the Commission to influence and limit collective bargaining as the Commission has done here.

Accordingly, it is hereby

ORDERED that Defendants shall forthwith cease and desist from any involvement in the collective bargaining process between the Washington State Nurses Association and those hospitals which are regulated by Defendants.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED at Tacoma, Washington, this 27th day of JULY, 1984.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION

vs.

WASHINGTON STATE HOSPITAL
COMMISSION, et al

CIVIL ACTION DOCKET NO. C83-533T
JUDGMENT

This action came on for trial before the court, United States District Judge JACK E. TANNER presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged .....

Defendant shall forthwith Cease & desist from any invlolvement [sic] in the collective bargaining process between the Washington State Nurses Association and those hospitals which are regulated by Defendants.

DATED AT: Tacoma, Washington

Date: July 27, 1984